85-455

Supreme Court, U.S.
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No. 85—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POLO FASHIONS, INC.,

Petitioner,

v.

STOCK BUYERS INTERNATIONAL, INC., COLUMBUS BUSINESS SYSTEMS, INC., EUGENE SERGIO, and MORTON LADOWITZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by exercising its supervisory powers to prohibit district courts from ever appointing counsel for an interested party to prosecute criminal contempt proceedings pursuant to Fed. R. Crim. P. 42(b)?

2. Whether the Court of Appeals erred by exercising its supervisory powers to reverse the convictions below absent a finding of prejudice to the defendants?

PARTIES TO THE PROCEEDINGS

Petitioner Polo Fashions, Inc.[1] was the appellee below.

The appellants below (respondents in this Court) were Stock Buyers International, Inc., Columbus Business Systems, Inc., Eugene Sergio, and Morton Ladowitz.[2]

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[1] A listing of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Polo Fashions, Inc. pursuant to Rule 28.1 is printed as Appendix I to this petition.

[2] The caption of the opinion of the Court of Appeals for the Sixth Circuit of which review is sought reflects the involvement of certain third-party defendants at the trial level. Such third-party defendants were not parties to the appeal to the Sixth Circuit.

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OPINION BELOW

The decision of the Court of Appeals for the Sixth Circuit of which review is sought was issued on April 26, 1985. The opinion is reported at 760 F.2d 698, and is printed as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 26, 1985. Petitioner's timely petition for rehearing *en banc* was denied on June 17, 1985 (Appendix B); respondents' timely petition for rehearing was denied on June 19, 1985 (Appendix C). On August 14, 1985, the Court (O'Connor, J.) extended petitioner's time to file this petition for certiorari to and including September 17, 1985 (Appendix F). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the following statutory provision, the text of which is printed as Appendix G to this petition:

Rule 42(b), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Introduction

This case raises two significant questions: first, whether a court of appeals may, pursuant to its supervisory powers, prohibit district courts within its jurisdiction from vindicating their authority and enforcing their civil decrees by appointing opposing counsel in an underlying civil action to prosecute criminal contempt proceedings pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure ("Rule 42(b)"); and second, whether a court of appeals may, pursuant to its supervisory powers, reverse convictions on this ground without first finding prejudice to defendants.

Petitioner Polo Fashions, Inc. ("Polo") submits that, by answering both questions in the affirmative, the Sixth Circuit Court of Appeals has established a rule that conflicts directly with (i) decisions in other circuits, (ii) Rule 42(b), and (iii) settled precedents of this Court. Because of these conflicts, and because the rule established by the Sixth Circuit severely restricts the federal courts' vitally important ability to enforce their own decrees, Polo respectfully submits that a writ of certiorari should issue.

The Proceedings Below

On January 21, 1982, Polo filed suit in the United States District Court for the Southern District of Ohio, alleging that respondents Stock Buyers International, Inc. ("Stock Buyers"), Columbus Business Systems, Inc. ("CBS"), and Eugene B. Sergio ("Sergio") were engaged in counterfeiting activities that infringed Polo's registered trademarks. On February 3, 1982, the District Court entered an agreed preliminary injunction order (the "Agreed Order") in which Sergio, Stock Buyers, and CBS consented, *inter alia*, not to sell any more counterfeit Polo garments.

On August 9, 1983, Polo moved the District Court, pursuant to Rule 42(b), to issue criminal contempt citations

against the three above-named respondents and respondent Morton Ladowitz (collectively, "the defendants"), alleging that the defendants had willfully violated the terms of the Agreed Order. Polo also requested that its attorneys be appointed by the District Court to prosecute the criminal contempt charges.[3]

On August 24, 1983, the District Court entered an order (the "Rule 42(b) Order") in which it found probable cause to believe that the defendants had willfully violated the Agreed Order, and appointed Polo's counsel to prosecute them for criminal contempt. Defendants' motion to vacate the Rule 42(b) Order on due process grounds because of the appointment of Polo's counsel was denied by the District Court.[4]

The criminal contempt trial began on February 21, 1984, and concluded on February 24, 1984, when the jury returned guilty verdicts against all four defendants. Polo presented overwhelming evidence that the defendants violated the Agreed Order by establishing an extensive counterfeiting operation. During the year following entry of the Agreed Order, for example, the defendants withdrew over $1,000,000 in cash from bank accounts of entities they created to pursue this criminal activity. The District Court sentenced Sergio and Ladowitz to six month terms of imprisonment and committed fines of $100,000 each. Stock Buyers and CBS also were fined $100,000 jointly.

On appeal, the Court of Appeals for the Sixth Circuit rejected defendants' arguments that the Agreed Order was too vague and that the evidence of willful violation was insufficient to support the contempt charges. *Polo Fashions, Inc. v. Stock Buyers International, Inc.*, 760 F.2d 698, 700 (6th Cir. 1985)

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[3] Jurisdiction in the District Court with respect to the contempt charges was proper under 18 U.S.C. § 401(3).

[4] The District Court's Rule 42(b) Order and its denial of the motion to vacate that Order are printed, respectively, as Appendices D and E to this petition.

(Appendix A at A-3—A-4). The Court found no due process violation or other constitutional infirmity during the trial and recognized that in *Musidor, B.V. v. Great American Screen,* 658 F.2d 60 (2d Cir. 1981), *cert. denied,* 455 U.S. 944 (1982), the Second Circuit had expressly determined that Rule 42(b) permits—and the practicalities of the situation frequently require—the federal courts to appoint counsel for the complaining party to prosecute criminal contempts. *Polo Fashions,* 760 F.2d at 701-02 (Appendix A at A-6—A-7).

Nevertheless, the Court of Appeals invoked its supervisory powers and reversed the convictions. The Court ruled on the basis of its perception that a complaining party's counsel could never adhere to the dual ethical obligations of public prosecutors in prosecuting conventional statutory violations and that such obligations are fully applicable in criminal contempt proceedings. *Id.* at 704-06 (Appendix A at A-11—A-14). The Court did not, however, suggest that Polo's counsel in fact failed to meet those obligations or that counsel's participation in the prosecution prejudiced the defendants in any way. It predicated its decision *solely* on its supervisory authority. *Id.* at 704 (Appendix A at A-12). The Court determined that all defendants subject to criminal contempt charges in the Sixth Circuit had a right—albeit of unspecified origins—to "be prosecuted by disinterested, publicly employed attorneys." *Id.*[5] Based on that holding, the Court reversed the convictions and remanded for a new trial.

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[5] The Court did permit the District Court to appoint a "disinterested attorney" if the United States Attorney should decline to prosecute upon request. It did not indicate, however, how the services of such an attorney would be obtained or how he would be compensated. *Id.* at 705 (Appendix A at A-14). *See infra* note 9 p. 7.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals Which Have Held That Prosecution Of Criminal Contempt Proceedings By A Party Interested In The Underlying Civil Action Is Permissible.

The opinion of the Court of Appeals holds that federal courts in the Sixth Circuit can no longer vindicate their authority and enforce their decrees by appointing opposing counsel in underlying civil litigation to prosecute criminal contempt proceedings. *Polo Fashions,* 760 F.2d at 705 (Appendix A at A-7). In so holding, the decision of the Court of Appeals conflicts with decisions of the Second and Seventh Circuits.

The Court of Appeals itself candidly recognized that its holding was in conflict with the Second Circuit's decision in *Musidor, B.V. v. Great American Screen. See Polo Fashions,* 760 F.2d at 701-02 (Appendix A at A-6—A-7). In *Musidor,* the Second Circuit expressly rejected the argument, relied upon by the Court of Appeals below, that the potential conflict of interest of counsel for the opposing party in an underlying civil action would operate impermissibly as an inducement for him to act unfairly in prosecuting criminal contempt charges. *Musidor,* 658 F.2d at 64.

The Seventh Circuit has also upheld the appointment of counsel for the opposing party in civil actions to prosecute a related criminal contempt proceeding. *United States ex rel. Brown v. Lederer,* 140 F.2d 136 (7th Cir.), *cert. denied,* 322 U.S. 734 (1944).[6] The Sixth Circuit's contrary position is

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[6] In *Lederer,* the Seventh Circuit expressly rejected appellant's challenge to his criminal contempt conviction on the ground that criminal contempt proceedings should be prosecuted only by the Attorney General, United States Attorney, or their assistants. *Lederer,* 140 F.2d at 138. The Sixth Circuit sought in its opinion below to distinguish the *Lederer* opinion because it does not reflect that appointed counsel had been involved in the underlying civil action. *Polo Fashions,* 760 F.2d at 702 (Appendix A at A-7—A-8). However, court records reflect that the complaining party's counsel was in fact appointed to prosecute the contempt. A copy of the pertinent excerpt from the record in *Lederer* is printed as Appendix H to this petition.

supported by *Brotherhood of Locomotive Firemen and Enginemen v. United States,* 411 F.2d 312 (5th Cir. 1969).[7]

Criminal contempt proceedings are of critical importance in vindicating courts' authority to enforce their own orders and thus in insuring the effective administration of justice.[8] By holding, contrary to the decisions of other circuits, that federal courts cannot appoint attorneys for interested parties to prosecute criminal contempts, the Court of Appeals has fundamentally undermined the power of federal courts in the Sixth Circuit to enforce their decrees and has thereby undermined the effective administration of justice. The ability of the federal courts to police their own decrees should turn on a uniform rule of law, not on geography.

II. The Decision Below Conflicts With Rule 42(b).

In addition to the conflict with two circuits, the opinion below is in conflict with Rule 42(b), adopted and promulgated by this Court. The genesis, content, and purpose of that rule make this abundantly clear.

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[7] State courts are also sharply divided on this issue. The highest courts in Illinois, Massachusetts, and New Jersey have upheld the practice of appointing opposing counsel in underlying civil actions as criminal contempt prosecutors; courts in Minnesota, Nebraska, and West Virginia have rejected it. *Marcisz v. Marcisz,* 357 N.E.2d 477, 479 (Ill. 1976); *Katz v. Commonwealth,* 399 N.E.2d 1055, 1060 (Mass. 1979); *Department of Health v. Roselie,* 169 A.2d 153, 159 (N.J. 1961); *Peterson v. Peterson,* 153 N.W.2d 825, 830 (Minn. 1967); *Leeman v. Vocelka,* 32 N.W.2d 274, 278 (Neb. 1948); *State ex rel. Koppers Co. v. International Union of Oil, Chemical and Atomic Workers,* 298 S.E.2d 827, 830 (W. Va. 1982).

[8] As this Court long ago held:

> The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Ex parte Robinson, 86 U.S. 505, 510 (1873).

The appointment of the complaining party's counsel to prosecute a criminal contempt is a "long-standing practice the validity of which, in principle, is not subject to question" and which long antedates the adoption of Rule 42(b) in 1946. *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 592 F. Supp. 734, 739 (S.D.N.Y. 1984), *appeal docketed*, Nos. 85-1068 and 1075-78 (2d Cir. Mar. 5, 1985). *See also Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, 208 F. 335, 344 (S.D. Ohio 1913); *Civil and Criminal Contempt in Federal Courts*, 17 F.R.D. 167, 172 (1955).

Prior to the adoption of Rule 42(b), Judge Learned Hand recognized the desirability and appropriateness of appointing private counsel, and suggested a procedure to insure that the defendant recognized that the contempt charges he faced were criminal, notwithstanding the ambiguities raised by appointment of opposing civil counsel as prosecutor.

> [*T*]*he judge may prefer to use the attorney of* a *party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should;* but obviously the situation may in that event be equivocal, for the respondent will often find it hard to tell whether the prosecution is not a remedial move in the suit, undertaken on behalf of the client. This can be made plain if the judge enters an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court, and if the papers supporting the process contain a copy of this order or allege its contents correctly.

McCann v. New York Stock Exchange, 80 F.2d 211, 214 (2d Cir. 1935), *cert. denied sub nom. McCann v. Leibell*, 299 U.S. 603 (1936) (emphasis added).

Rule 42(b) was adopted to remedy the notice problem articulated in *McCann;* in fact, the Advisory Committee on Rules relied upon the *McCann* case in developing the rule. *Polo Fashions*, 760 F.2d at 701 (Appendix A at A-5—A-6); *see*

also Musidor, 658 F 2d at 64. Thus the Advisory Committee in proposing and this Court in adopting Rule 42(b) were fully aware of the policy favoring and the practice permitting appointment of private counsel articulated in *McCann.* " Rule 42 has consistently been recognized to be no more than a restatement of the law existing when the Rule was adopted." *United States v. Wilson,* 421 U.S. 309, 317 (1975). Indeed, the text of the rule itself refers to "an attorney appointed by the Court . . .." By prohibiting the appointment of opposing counsel in the underlying civil litigation to prosecute criminal contempt proceedings, the decision of the Court of Appeals contravenes this Court's implicit approval of the practice by its promulgation of Rule 42(b).

In addition, by proscribing such appointments the Court of Appeals has effectively limited criminal contempt proceedings solely to those cases which the Justice Department chooses to pursue. This constitutes a substantial and unwarranted restriction of the federal courts' contempt powers. The Justice Department has the "absolute discretion to decide whether to prosecute a case." *United States v. Nixon,* 418 U.S. 683, 693 (1974); *United States v. Cox,* 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom. Cox v. Hauberg,* 381 U.S. 935 (1965). If the Justice Department declines to prosecute, the rule enunciated by the Court of Appeals provides no mechanism for any federal court to vindicate its authority. *See United States v. McKenzie,* 735 F.2d 907 (5th Cir. 1984) (United States Attorney declined judicial request to prosecute for criminal contempt).[9] If the decision below prevails, federal courts would be left with no assurance that any contempt, no matter how egregious, would be prosecuted. Read literally, the opinion

[9] The suggestion of the Court of Appeals that, if the Justice Department declines to act, a disinterested private attorney may be appointed ignores the practicalities of the situation. As the Second Circuit noted in *Musidor,* 658 F.2d at 65:

> There is no fund out of which to pay other counsel . . . nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available.

would even prohibit prosecution of contempt proceedings by government agencies, such as the Securities and Exchange Commission and the Federal Trade Commission, which have historically filled prosecutorial gaps in matters concerning their respective areas of expertise.[10] It was precisely to preserve the traditional judicial contempt power that the provisions for private prosecutions were codified in Rule 42(b). *See Musidor,* 658 F.2d at 65.[11]

III. The Decision Below Misconstrues This Court's Precedents Concerning Criminal Contempt Proceedings.

The Sixth Circuit reached its conclusion by misreading *Bloom v. Illinois,* 391 U.S. 194 (1968), to stand for the proposition that criminal contempt proceedings are essentially coterminous with traditional criminal actions and that all procedural safeguards applicable to the latter are equally applicable to the former. *Polo Fashions,* 760 F.2d at 704-05 (Appendix A at A-12—A-13). Hence, the Court of Appeals held, criminal contempt defendants are entitled to a prosecutor with precisely the same dual ethical obligations as a public prosecutor—obligations which the Court believed counsel for an interested party inherently could not satisfy.[12] That holding is a serious distortion of this Court's opinion in *Bloom* and

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[10] In *Lederer,* for example, the injunction that the contempt defendants were found to have violated had been obtained by the federal Office of Price Administration ("OPA"), and attorneys for the OPA were appointed to prosecute the contempt proceedings. *Lederer,* 140 F.2d at 137-38, Appendix H. Such a procedure would not be permitted under the rule enunciated by the Court of Appeals below.

[11] The judicial contempt power has, of course, application far beyond the area of trademark infringement presented here. The holding below would extend to all substantive areas of the law in which injunctive relief is commonly issued, including trademark, antitrust, patent, labor, civil rights, bankruptcy, and securities regulation.

[12] The Court of Appeals did not point to any ethical or other prosecutorial obligation which Polo's counsel *in fact* failed to satisfy. Moreover, it cited no support for its assumption that a defendant in a prosecution for statutory violations has a constitutional right to a "disinterested" prosecutor.

ignores the long line of decisions prior and subsequent to *Bloom* that distinguish criminal contempt proceedings from criminal prosecutions.

In *Bloom,* this Court held that the Constitution guarantees the right to a jury trial in "non-petty" criminal contempt proceedings. That is all that was presented to this Court; that is all that this Court decided. To rely upon *Bloom* for the broad proposition that criminal contempt and traditional criminal proceedings are procedurally identical is to stretch the opinion beyond recognition and to ignore prior and subsequent decisions of this Court. In fact, as this Court has made clear in opinions before and after *Bloom,* criminal contempt proceedings are *sui generis,* neither criminal nor civil within the ordinary meaning of those words. *See Myers v. United States,* 264 U.S. 95, 104-05 (1924); *Frank v. United States,* 395 U.S. 147, 151 (1969). As such, they do not require imposition of every procedural safeguard present in criminal actions.

Since *Bloom,* for example, this Court has reaffirmed the viability of the summary contempt power as an exception to the traditional criminal law principle that punishment can only follow a determination of guilt after trial or plea, *Bell v. Wolfish,* 441 U.S. 520, 535 n.17 (1979); emphasized the flexibility of the definition of "petty offense" in the contempt context as opposed to the rigidity of the definition of "petty" traditional crimes under 18 U.S.C. §1(3), *Muniz v. Hoffman,* 422 U.S. 454, 476-77 (1975); and rejected the notion that due process requires a "full-scale trial" for criminal contempt proceedings. *Taylor v. Hayes,* 418 U.S. 488, 500 (1974). Just as *Bloom* has not been held to mandate application of *every* traditional criminal procedural right to criminal contempt proceedings, so, *a fortiori,* nothing in *Bloom*—or any other decision of this Court—requires that criminal contempt proceedings be prosecuted by counsel who has interests identical in all respects to those of public prosecutors.

This, of course, is logical. Criminal contempt prosecutors do *not* represent the United States. They represent the court; and the court, not the government of the United States, is

responsible for the prosecution. *United States v. McKenzie,* 735 F.2d 907, 911-12 (5th Cir. 1984). Moreover, because the court retains supervision of criminal contempt proceedings, the prosecutor lacks most of the powers and discretion of a public prosecutor in conventional criminal actions; in contempt proceedings, these powers repose largely in the trial judge. For example, in an ordinary criminal action the public prosecutor has the power to initiate or terminate a prosecution; the court has no power either to force the government to prosecute or to prevent it from terminating a prosecution. *See United States v. Nixon,* 418 U.S. at 693; *United States v. Cox,* 342 F.2d at 171. In criminal contempt proceedings, however, this prosecutorial power does not belong to the prosecutor but rather to the court, which has full discretion to initiate or terminate a contempt prosecution. *See United States v. McKenzie,* 735 F.2d at 911.

By holding that the role of criminal contempt prosecutors is identical to that of public prosecutors in conventional criminal actions, the Sixth Circuit ignored the fundamental distinctions between these proceedings and seriously misinterpreted and misapplied this Court's opinion in *Bloom.*

IV. The Court Of Appeals' Reversal Of The Convictions Exceeded Its Supervisory Powers Under Controlling Decisions Of This Court.

This Court has repeatedly cautioned federal courts to use their supervisory powers in criminal cases to formulate procedural rules only when such exercise is necessary to remedy violations of recognized rights, preserve judicial integrity, or deter future misconduct without compromising the victim's interests. *United States v. Hasting,* 461 U.S. 499, 505-07 (1983); *United States v. Payner,* 447 U.S. 727, 734-37 (1980). None of those interests is served by the judgment below. To the contrary, as set forth above, the Court of Appeals, acting *sua sponte,* reached out to use its supervisory powers to proscribe a procedure under Rule 42(b) which has long been accepted by this Court and, implicitly, by Congress, and which has been explicitly approved by other courts as well. By doing so, the Court of Appeals exceeded its authority.

Most importantly, the Court of Appeals' reliance upon its supervisory powers to reverse the convictions below is directly contrary to this Court's recent holdings that reversals of convictions under the supervisory powers of the federal courts must be approached with caution, *United States v. Payner,* 447 U.S. at 734, and that the purposes properly served by the use of supervisory powers are not significantly implicated where the errors alleged are harmless. *United States v. Hasting,* 461 U.S. at 505-06.

In the present case, not only did the Court of Appeals specifically disclaim finding any due process violations, but it failed to identify any prejudice whatsoever suffered by the defendants. Under the circumstances presented here, the Court's reversal of the convictions pursuant to its supervisory powers simply does not comply with the standards announced by this Court in *United States v. Hasting* and *United States v. Payner.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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September 17, 1985

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-3332

United States Court of Appeals

FOR THE SIXTH CIRCUIT

POLO FASHIONS, INC., ET AL.,
Plaintiffs-Appellees,

V.

STOCK BUYERS INTERNATIONAL, INC.; COLUMBUS BUSINESS SYSTEMS, INC.; EUGENE SERGIO and MORTON LADOWITZ,
Defendants-Appellants,

FRANK EDMUNDS, ET AL.,
Third Party Defendants.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed April 26, 1985

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge.

LIVELY, Chief Judge. The defendants appeal from jury convictions of criminal contempt and the punishments imposed by the district court.

I.

Polo Fashions, Inc. (Polo) filed suit in the district court on January 21, 1982, alleging that Stock Buyers International, Inc. (Stock Buyers), Columbus Business Systems, Inc. (CBS), and Eugene B. Sergio were engaged in activities that infringed Polo's registered trademarks. In its complaint Polo sought injunctive relief, an accounting, costs and attorney fees. On February 3, 1982 the district court entered an agreed preliminary injunction order.

On August 9, 1983 Polo moved the district court to issue civil and criminal contempt citations against the three defendants and Morton Ladowitz, an officer, director and shareholder of Stock Buyers. Polo also requested that its attorneys be appointed to prosecute the criminal contempt charges. On August 24, 1983 the district court entered an order in which it determined that there was probable cause to believe that the defendants and Ladowitz willfully violated the terms of the agreed injunction, and that "the appointment of Polo's counsel to prosecute the criminal contempt will facilitate an expeditious resolution of these charges since Polo's counsel is fully familiar with this matter." The order, entered pursuant to Rule 42(b), Fed. R. Crim. P., appointed two New York City law firms together with Polo's counsel of record, a Columbus, Ohio attorney, to prosecute the criminal contempt charges. All appointees were attorneys for Polo.

The district court then signed and entered a statement of charges which had been prepared by Polo's counsel. The statement of charges was amended prior to hearing without objection. The defendants and Ladowitz pled not guilty to the charges and a trial date was set. (Hereafter Ladowitz is referred to as a defendant along with the three original defendants). The defendants made a motion to vacate the order appointing special counsel on the ground that appointed counsel were "too privately interested" to properly prosecute the case. The district court denied this motion, along with others filed by the defendants, but it granted the defendants' motion for trial by jury.

Trial of the contempt charges commenced on February 21, 1984 before the district judge and a jury. Two attorneys for Polo, one from Columbus and one from New York, appeared for the prosecution. No one from the office of the United States Attorney appeared in the proceedings. The jury found all four defendants guilty and the district court passed sentence on April 25, 1984. The individual defendants, Sergio and Ladowitz, were each sentenced to imprisonment for six months and fined $100,000, to be paid to Polo. The corporate defendants were jointly fined $100,000. All defendants have appealed, and we reverse for a new trial.

II.

The defendants have presented ten separate claims of reversible error. However, one assignment is dispositive. Therefore, we will not discuss those issues which are not likely to arise at a retrial or the many claims of error that are based on trial rulings which were made in the exercise of the trial judge's discretion and under different circumstances than will probably exist at a retrial. There are two claims of error other than the dispositive one which must be considered, however, as they would require dismissal rather than retrial if the court were to agree with the defendants.

A.

The defendants argue that the injunction was too vague to be the basis of a contempt action. We disagree. The preliminary injunction was sufficiently clear and specific to provide the basis for criminal contempt proceedings. It was an agreed order and none of the original defendants ever objected to its terms, claimed they were unclear or sought a clarification prior to institution of contempt proceedings. The defendants acted at their own risk by failing to seek the court's interpretation of the injunction if they had any good faith doubt as to its meaning or by failing to have it set aside or amended if

they thought it was defective. Once the injunction was entered the defendants were bound to obey it. Where, as here, the issuing court has jurisdiction, the validity of the injunction is not an issue in a criminal contempt prosecution. *Walker* v. *City of Birmingham*, 388 U.S. 307, 315-20 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 293-94 (1947).

B.

The defendants contend that the evidence of willful violation by CBS was insufficient to support the guilty verdict and that Ladowitz was not shown to have actual knowledge of the preliminary injunction. We find the evidence of involvement by CBS in activities prohibited by the injunction fully sufficient to support the verdict. As to Ladowitz, he was an officer, director and shareholder of Stock Buyers, a party to the consent injunction. Thus, by the terms of Rule 65(d), Fed. R. Civ. P., he was bound by the order whether or not he had actual notice. Further, in her opening statement at the contempt trial one of the attorneys for the defendants stated that "these gentlemen," referring to Sergio and Ladowitz, went to their attorney and asked that he explain to them how to comply with the injunction. Therefore, the evidence of Ladowitz's knowledge of the injunction provisions was sufficient.

III.

The determinative factor relates to the appointment of opposing counsel in the civil case as sole prosecutors of the criminal contempt action. The defendants maintain that in the absence of any supervision or control by the United States Attorney's office, the prosecution of a criminal contempt action by counsel for a party in the underlying civil litigation constitutes a denial of due process. Polo responds that the practice has been approved repeatedly and that it promotes efficiency by placing the prosecution of a case in the hands of persons most familiar with the facts.

A.

The strongest support for Polo's position lies in dictum of Judge Learned Hand in *McCann* v. *New York Stock Exchange,* 80 F.2d 211 (2d Cir. 1935), *cert. denied sub nom. McCann* v. *Leibell,* 299 U.S. 603 (1936). After discussing the confusion which often arose over whether contempt proceedings were civil or criminal, Judge Hand wrote:

> Surely it should be possible to find some simple and certain test by which the character of the prosecution can be determined. We think that it is. Criminal prosecutions, that is, those which result in a punishment, vindictive as opposed to remedial, are prosecuted either by the United States or, by the court to assert its authority. The first are easily ascertainable; they will be openly prosecuted by the district attorney; it would not seem to be of consequence how they are entitled when that is true. In the second the court may proceed sua sponte without the assistance of any attorney, as in the case of disorder in the courtroom; there can be little doubt about the kind of proceeding when that is done. But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should; but obviously the situation may in that event be equivocal, for the respondent will often find it hard to tell whether the prosecution is not a remedial move in the suit, undertaken on behalf of the client. This can be made plain if the judge enters an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court, and if the papers supporting the process contain a copy of this order or allege its contents correctly.

Id. at 214-15. It is generally agreed that Rule 42(b), Fed. R. Crim. P., was adopted in response to the problem identified in *McCann.* See *Musidor* v. *Great American Screen,* 658 F.2d 60, 64 (2d Cir. 1981), *cert. denied,* 455 U.S. 944 (1982) ("the Advisory Committee on Rules relied upon the *McCann* case in

establishing Federal Rule of Criminal Procedure 42"). Rule 42(b) provides:

> **Rule 42. Criminal Contempt**
>
> **(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Relying upon *McCann,* the Second Circuit has consistently approved the appointment of opposing counsel to prosecute criminal contempt actions. In *Musidor* the court held that the due process clause does not require the selection of someone from the office of the United States Attorney to prosecute criminal contempt actions, and "[t]he practicalities of the situation—when the criminal contempt occurs outside the presence of the court—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt." 658 F.2 at 65. The "practicalities" referred to are the fact that these are not the kinds of cases which legal aid societies and public defenders take on and there are no funds out of which to pay private counsel, "nor would it be proper that he be paid by the opposing party." *Id.* Ironically, this is exactly what happens when counsel already employed by an interested party is appointed—the prosecutor is paid by the opposing party.

It is clear that Rule 42(b) does not explicitly permit prosecution of a criminal contempt by the attorney for a party in the underlying proceedings. By its terms the Rule merely permits the court to give notice to a defendant by an order to show cause or an order of arrest "on application . . . of an attorney appointed by the court for that purpose. . . ." The Second Circuit acknowledged this literal limitation of Rule 42(b) in *Universal City Studios, Inc.* v. *N.Y. Broadway International Corp.*, 705 F.2d 94, 97 (2d Cir. 1983), but found a broader purpose by implication:

> Though Rule 42(b) in terms refers to the United States Attorney or an attorney appointed by the court solely for purposes of giving notice to the accused contemnor, the plain implication of the Rule is that the proceedings are to be prosecuted either by the federal prosecutor or a private attorney specially designated to do so.

Assuming this reading of Rule 42(b) is correct, it does not answer the question in our case. The fact that the Rule may be read to authorize the appointment of a private attorney to prosecute a criminal contempt action does not mean that counsel for the opposing party in underlying litigation may be appointed or, if appointed, may prosecute the action without any supervision by the office of the United States Attorney.

B.

No court of appeals, other than the Second Circuit, has held unequivocally that counsel for the opposing party may be appointed to prosecute a criminal contempt action. Cases from other circuits cited by Polo are distinguishable.

In *United States* v. *Lederer*, 140 F.2d 136, 138 (7th Cir.), *cert. denied*, 322 U.S. 734 (1944), the court stated:

> Appellant specifically objects to the court's appointing counsel, and insists that in a criminal contempt proceeding, the case against him should be in charge of the Attorney

> General or some assistant, or the United States District Attorney. In the absence of any specific statute, we think it was not only permissible but entirely appropriate that the court appoint counsel to take charge of proceedings instituted to enforce its order, and the attorneys thus appointed would be authorized to begin and carry through the contempt proceedings. The court is not required to select counsel from the staff of the United States District Attorney. McCann v. New York Stock Exchange, 2 Cir., 80 F.2d 211; Western Fruit Growers v. Gotfried, 9 Cir., 136 F.2d, 98.

Polo's reliance on *Lederer* is greatly weakened, however, by the fact that there is no indication that the two private attorneys appointed by the court were counsel for the party seeking an adjudication of contempt or had any previous connection with the case. All this case tells us is that prior to the adoption of Rule 42(b) a court could appoint private attorneys to prosecute a criminal contempt action.

Polo also cites *In re C.B.S., Inc.*, 570 F.Supp. 578 (E.D. La. 1983), *appeal dismissed for lack of jurisdiction sub nom. United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984). As authority for Polo's position in the present case this decision suffers from the same infirmity as *Lederer*. After C.B.S. violated a restraining order by televising a portion of a program the United States Attorney declined a request from all the judges of the Eastern District of Louisiana to prosecute the network for criminal contempt. A judge from outside the district was appointed to conduct the proceedings when all the judges of the Eastern District of Louisiana recused themselves after appointing two attorneys to prosecute C.B.S. for criminal contempt. There is no indication in the record that the attorneys who were appointed to prosecute the criminal contempt action were counsel for the parties who obtained the injunction. In fact, on appeal, the original plaintiffs were represented by their own counsel while the appeal was brought by the two appointed attorneys and the United States Attorney. *In re C.B.S., Inc.*, merely aligns the Fifth Circuit with the

Second in holding that Rule 42(b) permits the appointment of private attorneys to conduct criminal contempt proceedings as well as for the purpose of giving notice. 570 F. Supp. at 580-81. It does not consider whether the private attorneys so appointed may be counsel for the opposing party.

C.

Direct authority on the other side of the question is also scarce. In *Brotherhood of Locomotive Firemen and Enginemen* v. *United States,* 411 F.2d 312 (5th Cir. 1969), the court found many due process deficiencies in proceedings where a union was found guilty of criminal contempt. Among the errors identified by the court of appeals was the appointment of counsel for the railroads which sought the contempt adjudications as attorneys to conduct those proceedings. The court stated:

> As we look objectively at this record there is no doubt concerning the genesis of this due process deficiency. It flows directly from the fact that the governance of the whole criminal contempt proceeding was delivered into the hands of counsel for private parties, not the National Sovereign. This transcends the matter of competence, character and professional trustworthiness. Indeed, it is the highest claim on the most noble advocate which causes the problem—fidelity, unquestioned, continuing fidelity to the client. For while we would readily agree on this record that none of these distinguished counselors would have perverted a demand of the law in the prosecution of these respondents simply because it was detrimental to the interest of their railroad clients, the fact is that, continuing as they are in the related *merits,* case (note 4 *supra)* to the vigorous support of the Carriers' positions, they have a duty faithfully to assert every—the word is every—contention, refute every—the word is every—counter contention which they may legitimately and honorably do, which is disadvantageous to their carrier clients in this

> controversy. One such objective is to marshal and generate—through court orders if obtainable—pressures which will, or may, bring the Brotherhood earlier to book. To move fast, to get punitive orders which might put the Brotherwood in an awkward or disadvantageous position was therefore a desired goal on April 4. On the other hand, as prosecutors for the court,—*i. e.* the National Sovereign—there was an obligation to make sure that the respondents' rights were scrupulously preserved. No one would suggest now that in any way these fine lawyers submerged one interest over the other. But that is not the point. The point is that those conflicting claims of undivided fidelity present subtle influences on the strongest and most noble of men. The system we prize cannot tolerate the unidentifiable influence of such appeals.

411 F.2d at 319 (footnote omitted).

The defendants have cited several cases which hold that a party in the underlying civil case has no authority to participate in criminal contempt proceedings absent an appointment by the court. *E.g., In re Lahm Industries, Inc.,* 609 F.2d 567 (1st Cir. 1979); *Ramos Colon* v. *United States Attorney,* 576 F.2d 1 (1st Cir. 1978); *Kienle* v. *Jewel Tea Co.,* 222 F.2d 98 (7th Cir. 1955). However, like some of the cases cited by Polo, these decisions do not address the question in the present case. They merely confirm the fact that an appointment by the court is required for a private attorney to prosecute criminal contempt proceedings.

IV.

A.

This court appears never to have determined the propriety of appointing counsel for a party in the underlying case as sole, unsupervised prosecutor of a criminal contempt action. The contempt conviction in *TWM Manufacturing Co., Inc.* v. *Dura Corp.,* 722 F.2d 1261 (6th Cir. 1983), was reversed upon a

determination that the evidence did not support a finding of criminal contempt. There was no "testimonial hearing" on the contempt charges in *TWM Manufacturing.* The contempt proceedings were commenced by TWM filing a motion and brief with a notice for a hearing. On the hearing date, without objection, the district court proceeded to decide the contempt issue on the basis of affidavits and arguments. On appeal, Dura argued for reversal on the ground that the requirements of Rule 42(b) were not satisfied. The United States Attorney did not serve notice and the private attorney who served the notice had not been appointed by the court. This court did not reach the Rule 42(b) issue in light of its conclusion that the evidence was insufficient to support the conviction.

On at least two occasions this court has approved the practice of permitting private attorneys to assist public prosecutors in other types of criminal cases. In *Stumbo* v. *Seabold,* 704 F.2d 910 (6th Cir. 1983), a habeas corpus action, we found that a Kentucky law which permits a privately retained prosecutor to assist the public prosecutor in a criminal case does not constitute a per se violation of due process. In reaching this conclusion we noted that the Kentucky law "requires the public prosecutor to retain control over the conduct of the trial to ensure that the state's interests are protected." *Id.* at 911. *United States* v. *Denton,* 307 F.2d 336 (6th Cir.), *cert. denied,* 371 U.S. 923 (1962), was a bootlegging case in which an assistant regional counsel for the Internal Revenue Service made the opening statement for the government and questioned several witnesses. On appeal the defendant relied on the fact that the IRS attorney had not been specially appointed by the Attorney General to prosecute the action. In affirming the conviction, this court found that the trial was conducted by the United States Attorney and that the other lawyer only assisted.

B.

We conclude that it was an abuse of discretion for the district court to appoint attorneys for Polo to conduct the criminal contempt proceedings. These attorneys could assist

the United States Attorney or an assistant, but could not proceed alone. We make this determination under our supervisory authority[1] and do not decide that such a proceeding constitutes a per se due process violation. At one time criminal contempt was treated as a sui generis action, not requiring all the safeguards of traditional criminal proceedings. The development of safeguards for defendants in criminal contempt proceedings, particularly with respect to the right to trial by jury, was reviewed in *Bloom* v. *Illinois,* 391 U.S. 194 (1968). In *Bloom* the Court held that the Constitution guarantees the right to a jury trial in criminal contempt proceedings resulting in a sentence of imprisonment for two years. Writing for the Court, Justice White concluded that a defendant in a criminal contempt action has the right "not to be subjected to serious criminal punishment without the benefit of *all* the procedural protections worked out carefully over the years and deemed fundamental to our system of justice." *Id.* at 208 (emphasis added).

One of these procedural protections is the requirement that criminal actions be prosecuted by disinterested, publicly employed attorneys. A private attorney employed to represent a client does not operate under the same restraints as a public prosecutor. Aside from his ethical obligations a privately employed attorney has the single permissible objective of forwarding his client's interests. A public prosecutor, on the other hand, must consider the public interest which lies as much in seeing justice done in every case as in the successful prosecution of any particular case. The role of federal prosecutor was eloquently described by the Supreme Court in *Berger* v. *United States,* 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, there-

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[1] See *Bartone* v. *United States,* 375 U.S. 52, 54 (1963) (per curiam) (Both the Supreme Court and the courts of appeals have broad powers of supervision over federal proceedings.).

> fore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

These principles have been codified in the ABA Model Code of Professional Responsibility. Canon 7 of the Model Code provides, at EC7-13:

> **EC 7-13** The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

See also, *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1218 (1958):

> The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to a partisan advocate must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to

> furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

It is too much to expect an attorney committed to his client and the client's cause to recognize the "twofold aim" referred to in *Berger* when acting as prosecutor in proceedings which, if successful, can benefit immeasurably that client and his cause. We recognize that federal prosecutors occasionally overlook their twofold obligation and become too concerned with obtaining convictions. However, this overzealousness does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction.

The practicality of having an attorney who is familiar with the facts of the underlying litigation involved in a criminal contempt prosecution is obvious. However, our system of justice recognizes "higher values than speed and efficiency." *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). Where counsel for an interested party is appointed pursuant to Rule 42(b) he or she cannot conduct the criminal contempt proceedings, but may assist the United States Attorney or the assistant United States Attorney assigned to the prosecution. If the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so. In that event, again, counsel for an interested party may be appointed to assist. However, in this circuit an attorney for a party in underlying litigation may not conduct criminal contempt proceedings as sole or primary counsel.

The judgment of the district court is reversed, and the case is remanded for the retrial mentioned on page 3.

APPENDIX B

No 84-3332

United States Court of Appeals

FOR THE SIXTH CIRCUIT

POLO FASHIONS, INC., ET AL.,

Plaintiffs-Appellees,

v.

STOCK BUYERS INTERNATIONAL, INC.,
COLUMBUS BUSINESS SYSTEMS, INC.,
EUGENE SERGIO AND MORTON LADOWITZ,

Defendants-Appellants,

FRANK EDMUNDS, ET AL.,

Third Party Defendants

ORDER

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN

John P. Hehman, Clerk

APPENDIX C

No. 84-3332

United States Court of Appeals

FOR THE SIXTH CIRCUIT

POLO FASHIONS, INC.

Plaintiff-Appellee,

v. ORDER

STOCK BUYERS INTERNATIONAL, INC., et al.,

Defendants-Appellants.

Before: LIVELY, Chief Judge; ENGEL, Circuit Judge; and PECK, Senior Circuit Judge.

Upon receipt and consideration of the petition for rehearing filed herejn by the appellants, the court concludes that the matters raised in the petition were fully considered upon the original submission of this case and that rehearing is not required. The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk

APPENDIX D

United States District Court

FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

POLO FASHIONS, INC.,
Plaintiff,

v.

STOCK BUYERS INTERNATIONAL, INC., *et al.*
Defendants,

CIVIL ACTION
NO. C-2-82-76
JUDGE KINNEARY

v.

FRANK EDMUNDS, *et al.*,
Third Party Defendants.

ORDER APPOINTING COUNSEL PURSUANT TO FED. R. CRIM. P. 42(b)

The plaintiff Polo Fashions Inc. ("Polo") having moved on August 9, 1983, for the issuance of civil and criminal contempt citations against defendants Stock Buyers International Inc. ("Stock Buyers"), Columbus Business Systems, Inc. ("CBS") and Eugene Sergio ("Sergio"), and against Mort Ladowitz ("Ladowitz") an officer, director and shareholder of Stock Buyers and CBS, for wilfully violating the February 3, 1982 preliminary injunction (the "injunction") in this action, and Stock Buyers, CBS, Sergio and Ladowitz having been served on August 9, 1983 with copies of all papers submitted in support of Polo's motion, and the Court having determined that there is probable cause from Polo's submissions to believe that the defendants and Ladowitz wilfully violated the provisions of the injunction; and the Court having been presented with and

considered Polo's application under Fed. R. Crim. P. 42(b) to have its counsel appointed to prosecute the criminal contempt charges; and it appearing to the Court that the charges of criminal contempt should proceed first to provide the defendants and Ladowitz with the due process and other protections available under the Constitution of the Federal Rules of Criminal Procedure, and that the appointment of Polo's counsel to prosecute the criminal contempt will facilitate an expeditious resolution of these changes since Polo's counsel is fully familiar with this matter; and

The Court having considered the Complaint and Exhibits thereto, the injunction, and Polo's application for an Order to show cause for citation for criminal and civil contempt, and the memorandum of law and affidavits and exhibits submitted in support of that application; it is

ORDERED that Polo's counsel of record in this proceeding together with Amster, Rothstein & Engelberg, 90 Park Avenue, New York, New York, and Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York, be and are appointed pursuant to Fed. R. Crim. P. 42(b) to prosecute the criminal contempt charges against the defendants and Ladowitz.

JOSEPH D. KINNEARY

United States District Judge

Dated: Columbus, Ohio
August 24, 1983

APPENDIX E

United States District Court

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

POLO FASHIONS INC.,
Plaintiff,

v.

STOCK BUYERS INTERNATIONAL, INC., et al., C-2-82-76
Defendants,

v.

FRANK EDMUNDS, et al.,
Third-Party Defendants.

OPINION AND ORDER

Plaintiff in this action, Polo Fashions, Inc., an exclusive and diversified clothier, has filed this suit against numerous defendants alleging violations of the federal trademark laws. Plaintiff has requested both injunctive and monetary relief. This action is currently before the Court on numerous motions associated with the criminal contempt proceeding scheduled for hearing on December 19, 1983. Plaintiff asserts that defendants violated the provisions of the preliminary injunction issued by the Court on February 3, 1982 and, therefore, should be held in criminal contempt.

On August 24, 1983, a statement of charges was issued by this Court which worked to charge defendants with criminal contempt. The statement of charges stated that probable cause did exist to believe that the provisions of the February 3rd Injunction had been violated by defendants. Also on August

24, 1983, the Court appointed plaintiff's counsel of record, together with the firms Amster, Rothstein and Engelberg and Skadden, Arps, Slate, Meagher and Flom, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, to prosecute the criminal contempt charge. With respect to the statement of charges, defendants have moved to vacate on the basis that there is no probable cause to believe that the defendants acted willfully in violating this Court's Injunction. Further, on September 30, 1983, defendants filed a motion to dismiss the statement of charges because sufficient facts had not been alleged to constitute criminal contempt. With respect to this Court's order appointing special counsel, defendants have moved to vacate because the appointed counsel is too privately interested to properly prosecute the case.

CRIMINAL CONTEMPT

Rule 42 of the Federal Rules of Criminal Procedure governs criminal contempt proceedings. That Rule states, in subdivision (b), that

> [a] criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest . . .[1]

Compliance with the procedural requirements of subdivision (b) is all that is required by federal law to commence a criminal contempt proceeding. *United States v. Powers,* 629 F.2d 619, 625 (6th Cir. 1980).

[1] Subdivision (a) relates to Summary Contempt proceedings. This case does not involve subdivision (a) as the alleged contemptuous acts did not occur within the actual presence of the Court.

Because Rule 42 is the exclusive provision to which a court must look for guidance in criminal contempt proceedings, it is apparent that criminal contempt is to be viewed somewhat differently from general criminal proceedings.

> Rule 42 . . . provides that criminal contempt actions are initiated neither by indictment nor by information [although they may be], but by simple notice. The requirements of the section are less strict and technical than those of the statutes under which criminal cases are instituted. The contempt proceeding is summary in character and technical pleadings are not required.

Bullock v. United States, 265 F.2d 683 (6th Cir.), *cert. denied,* 360 U.S. 909, 932 (1959); *see also United States v. Leyva,* 513 F.2d 774, 778 (5th Cir. 1975). The major procedural requirement that this Court must look to, therefore, is not what papers are filed with the Court, but that sufficient notice was given to defendants pursuant to Rule 42(b). "The purpose of notice is to inform the contemnor of the nature of the charge and enable the contemnor to prepare a defense." *United States v. Powers, supra,* at 625. The procedural safeguards inherent within the notice requirement are sufficient to protect defendants' rights to due process.

PLAINTIFF'S MOTION TO AMEND THE STATEMENT OF CHARGES

Plaintiff has responded to defendants' two motions regarding the statement of charges by filing a motion to amend those charges. Plaintiff's motion to amend the statement of charges does not seek to add additional or different charges, but only to simplify and clarify the existing charges. The Court will begin its analysis at this point since the amended statement of charges, if allowed, will render some of the arguments upon which defendants base their motions moot.

Plaintiff seeks to amend the statement of charges in two ways. First, it wishes to delete the charge relating to defendants' sale of counterfeit IZOD shirts and, second, to explicate

the element of knowledge in the remaining charge regarding defendants' sale of counterfeit Polo shirts. The Court can think of no reason and, indeed, no reason has been proffered, why plaintiff's motion should not be granted. Since it does not serve to materially alter the substantive content of the statement of charges, it cannot work to prejudice defendants. Defendants have had sufficient notice, pursuant to Rule 42(b), at their arraignment on August 26, 1983, of the charges against them. Plaintiff's amended statement of charges does not affect that notice and, therefore, does not work to prejudice the defendants' ability to defend themselves. Plaintiff's motion to amend the statement of charges is, in the opinion of the Court, meritorious.

STATEMENT OF CHARGES

Defendants have attacked the statement of charges on numerous grounds. However, the Court does not believe that defendants' focus is correct. Given the requirements of Rule 42, it is only incumbent upon the Court to give notice to the alleged contemnors of the time and place of the hearing and the essential facts which constitute the criminal contempt charged. The Court believes, in its arraignment of defendants on August 26, 1983, with regard to the pending criminal contempt action, that it has fulfilled its procedural duty under Rule 42.

Defendants initially assert that there does not exist probable cause from which the Court can deduce that defendants acted "willfully" and that, therefore, the statement of charges is fatally defective. The Court finds this argument to be without merit. All that is required in a criminal contempt proceeding is that the pleadings rest upon information and belief. *United States v. Mine Workers,* 330 U.S. 258, 296 (1946). Certainly this requirement has been met. Plaintiffs have offered evidence, by declaration, that the shirts sold by defendants were counterfeit. They also have presented facts from which one could deduce that defendants acted with the requisite intent. Plaintiff emphasizes the method in which defendants made the sale at issue, their use of a new company to effect the sales, and the

experience defendants had in the clothing business. It is clear that plaintiff, and the Court, has sufficient facts from which it can form a belief that defendants willfully violated this Court's injunction. More importantly, however, the defendants have been "... fairly and completely apprised of the events and conduct constituting the contempt charged." *Id.* at 297.

Defendants also attack the statement of charges, in a separate motion to dismiss, by arguing that the complained of conduct does not fit within the proscriptions of this Court's injunction. Defendants further argue that plaintiff's counsel has engaged in conduct which is so egregious that it, alone, is grounds for dismissal. Defendants initially address the charge, in the original statement of charges, relating to their violation of the injunction with respect to their sale of IZOD shirts. Defendants assert that the sale of counterfeit IZOD shirts, if such occurred, is not within the proscriptions of the injunction. Plaintiff has, in its amended statement of charges, deleted the charge relating to the IZOD shirts and, therefore, defendants' argument with respect to that charge is now moot. However, the Court must proceed to consider the efficacy of defendants' other points.

Defendants' main argument supporting its motion to dismiss is that the shirts sold by them are not within the subject matter of the injunction. The Court cannot accept defendants' premise that the sale of the shirts, immediately at issue, even if they were counterfeit, was not within the proscriptions of the injunction. Defendants were specifically enjoined from selling counterfeit shirts which contained counterfeit Polo trademarks or trade names. The injunction imposed upon defendants does not discriminate between the different forms by which a party may deal in counterfeit goods. If defendants, in fact, willfully sold counterfeit Polo shirts, this Court can only conclude that it violated this Court's injunction of February 3, 1983.[2]

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[2] Defendants argue that the February 3rd injunction is so ambiguous that it may not serve as the basis for a criminal contempt prosecution. This argument has no merit. The injunction is explicit in defining what type of conduct in which defendants are proscribed

Defendants have also argued that plaintiff's counsel is guilty of prosecutorial misconduct in its allegedly overzealous prosecution of the instant action. The Court similarly finds no merit in this assertion. The Court cannot conclude, from the evidence before it, that plaintiff's counsel has mislead the Court by falsifying the facts upon which it based its information and belief that defendants willfully violated the February 3rd injunction.

APPOINTMENT OF COUNSEL

Finally, defendants have moved to vacate this Court's order appointing plaintiff's counsel to prosecute the criminal contempt action. Defendants argue that the appointment of plaintiff's counsel was inappropriate because plaintiff's counsel has a ". . . distinct private interest in the outcome of the case." It is generally recognized that Rule 42(b) of the Federal Rules

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from engaging. Defendants well know that they are enjoined, by the terms of the injunction, from dealing in counterfeit Polo merchandise. Defendants argue, however, that the injunction should ". . . describe the characteristics which would permit a purchaser to distinguish 'authorized' goods from 'counterfeits.' " This is a too stringent requirement. The methods by which an enterprising entity may manufacture counterfeit clothes are so numerous that to require a party to list all distinguishing characteristics of its product in the injunction would be unreasonable. Furthermore, it is not necessary that the party against whom the infringement was effected divulge its distinguishing characteristics in so public a fashion. This information could be extremely useful to future would-be counterfeiters.

Defendants call this Court's attention to the case *Ideal Toy Co. v. Plawner Toy Mfg. Co.*, 685 F.2d 78 (3rd Cir. 1982) to support their assertion that the injunction was demonstrably ambiguous. However, that case is easily distinguishable. In *Ideal Toy Co.*, the injunction held to be ambiguous did not adequately describe the conduct which was proscribed since it only addressed generally the commodity at issue. In the instant case, the specific conduct of selling counterfeit shirts with counterfeit Polo trademark tags attached was prohibited. In *Ideal Toy Corp.*, the commodity at issue was a toy and it conceivably could have been copied to a degree which should not be found to infringe the injunction. In the instant case, the act of selling counterfeit shirts with counterfeit Polo trademark tags attached would violate the express terms of the injunction.

of Criminal Procedure authorizes a Court to appoint private counsel to litigate, as prosecutor, a criminal contempt action.

> Neither Rule 42 nor the Due Process clause requires the court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation—when the criminal contempt occurs outside the presence of the court but in civil litigation—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt.

Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981).

It is the opinion of the Court, in the interests of the expeditious resolution of the instant criminal contempt action, that Polo Fashion's counsel should undertake to prosecute defendants.

> [T]he judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should. . . .

McCann v. *New York Stock Exchange*, 80 F.2d 211, 214 (2d Cir. 1935). In any criminal contempt action in which the moving party's counsel is appointed as the prosecuting attorney, some degree of self-serving involvement is inevitable. However, its existence does not lighten the burden of proof which the appointed attorney must meet. It must still be proven, beyond a reasonable doubt, that defendants, in fact, willfully violated the terms of the injunction imposed by this Court.

WHEREUPON, upon consideration and being duly advised, this Court determines that plaintiff's motion to amend the statement of charges is meritorious and it is, therefore, GRANTED.

FURTHER, this Court determines that defendants' motion to vacate this Court's order of August 24, 1983, finding probable cause to exist that defendants willfully violated this Court's injunction, is without merit and it is, therefore, DENIED.

FURTHER, this Court determines that defendants' motion to vacate this Court's order appointing plaintiff's counsel pursuant to Federal Rule of Criminal Procedure 42(b) is without merit and it is, therefore, DENIED.

FURTHER, this Court determines that defendants' motion to dismiss the Statement of Charges is without merit and it is, therefore, DENIED.

FURTHER, the Court determines that defendants' request for an evidentiary hearing is rendered moot by the Court's rulings.

IT IS SO ORDERED.

JOSEPH P. KINNEARY

UNITED STATES DISTRICT JUDGE

APPENDIX F

Supreme Court of the United States

No. A-128

POLO FASHIONS, INC.,
Applicant,

v.

STOCK BUYERS INTERNATIONAL INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 17, 1985.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme
Court of the United States

Dated this 14th
day of August, 1985.

APPENDIX G

Rule 42. Criminal Contempt

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX H

District Court of The United States

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,

Plaintiff,

v.

ADOLPH LEDERER AND ARTHUR LEDERER CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF A. LEDERER COMPANY,

Defendants.

FILE NO. 43 C 126

ORDER APPOINTING COUNSEL

It appearing to this Court that there is good cause to believe that Arthur Lederer and Adolph Lederer, co-partners, doing business under the firm name of A. Lederer Company, 837 West Fulton Street, Chicago, Illinois, should be prosecuted by this Court for criminal contempt of this Court by reason of their disobedience of the preliminary injunction issued by this Court and entered on the 18th day of February, 1943, in the civil action entitled: *Prentiss M. Brown, Administrator, Office of Price Administration, Plaintiff, v. Adolph Lederer and Arthur Lederer, co-partners, doing business under the firm name of A. Lederer Company, Defendant,* Civil Action, File No. 43 C 126, it is hereby

ORDERED, that John F. Manierre and Robert B. Johnstone, attorneys employed by the Office of Price Administration, be

and they are hereby appointed to represent this Court in the instant matter and to prosecute on behalf of this Court the said Adolph Lederer and Arthur Lederer, co-partners, doing business under the firm name of A. Lederer Company, for criminal contempt of this Court.

BARNES
District Judge

Dated: August 23, 1943

APPENDIX I

Listing Required By Rule 28.1 of Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) and Affiliates of Petitioner Polo Fashions, Inc.

The parent companies, subsidiaries (other than wholly owned), and affiliates of petitioner Polo Fashions, Inc. are listed below.

1. Polo Fashions, Inc. is not owned by any parent corporation.

2. Polo Clothing Co., Inc. is a subsidiary of Polo Fashions, Inc. Polo Fashions, Inc. does not have an ownership interest in any other non-wholly-owned subsidiary.

3. Polo Fashions, Inc. has no affiliates, except as set forth above.

85-455

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85 --

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

POLO FASHIONS, INC.,

Petitioner

-vs-

STOCK BUYERS INTERNATIONAL, INC.,
COLUMBUS BUSINESS SYSTEMS, INC.,
EUGENE SERGIO
and MORTON LADOWITZ,

Respondents.

RESPONDENTS' MOTION TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

Carl Genberg
545 East Town Street
Columbus, Ohio 43215
(614) 228-2221

Counsel for Respondents

RESPONDENTS' MOTION TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Rule 16, Respondents hereby move this Honorable Court for an Order dismissing the Petition for Writ of Certiorari as this Court lacks subject matter jurisdiction to review a criminal conviction obtained in the absence of any representation of the United States of America by the United States Attorney General or other authorized representative. The grounds for this Motion are fully set forth in the accompanying Memorandum in Support.

Respectfully submitted,

Carl Genberg
Counsel for Respondents

PARTIES TO THE PROCEEDINGS

Neither Columbus Business Systems, Inc. nor Stock Buyers International Inc. has any parent companies or subsidiaries.

MEMORANDUM IN SUPPORT

Respondents were convicted of criminal contempt pursuant to 18 U.S.C. Section 402. This conviction was obtained not by the United States Attorney's office but by Petitioner's private counsel who volunteered their services to act as prosecutors in this matter. Throughout the proceedings in the district court and the court of appeals, Petitioner's counsel has argued the Rule 42(b) Fed.R.Crim.P. authorizes district courts to appoint private counsel not only to give notice of a criminal contempt but to *prosecute* the alleged contemnors as well.

Respondents respectfully submit that: Criminal contempt is an offense against the United States;*United States v. Williams*, 522 F.2d 830,836,839 *en banc*(5th Cir. 1980); All offenses against the United States must be prosecuted by the United States Attorney General or his assistants unless "otherwise provided by law." 28 U.S.C. Section 547; Rule 42(b) of the Fed.R.Crim.P. is merely a rule of procedure and was not intended by Congress to vest in the District Courts the power to appoint special prosecutors in cases of criminal contempt; Rule 42(b) of the Fed.R.Crim.P. by its express language only authorizes a district court to appoint counsel for the purpose of giving notice to the alleged contemnors of the criminal proceeding; The power to appoint inferior officers of the executive branch is of

constitutional dimensions. Art.II, Sec 2, Cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed 2d 659, 96 SCt 612 (1976); and as the District Court lacked power to appoint Petitioner's private counsel as special prosecutors and in the absence of any participation in the criminal trial of a representative of the United States, the entire proceedings in the district court and the court of appeals must be held a legal nullity and the Petition dismissed. *In re Lahm Industries, Inc.*, 609 F.2d 567 (1st Cir. 1979).

CONCLUSION

For all of the above reasons, Polo Fashions, Inc.'s Petition should be dismissed.

Respectfully Submitted,

Carl Genberg
545 East Town Street
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(614) 228-2221

Counsel of Record
18 November 1985

(3)

Supreme Court, U.S.
FILED
JUN 2 1986
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No. 85-455

In the Supreme Court of the United States

OCTOBER TERM, 1985

POLO FASHIONS, INC., PETITIONER

v.

STOCK BUYERS INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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25 pp

QUESTION PRESENTED

Whether the court of appeals erroneously reversed respondents' criminal contempt convictions because the attorneys who were appointed by the court to prosecute the contempt also represented petitioner in the underlying civil case.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-455

POLO FASHIONS, INC., PETITIONER

v.

STOCK BUYERS INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Following a jury trial in United States District Court for the Southern District of Ohio, respondents were convicted of criminal contempt, in violation of 18 U.S.C. 402. The district court sentenced each of the individual respondents to six months' imprison-

ment and a fine of $100,000, to be paid to petitioner Polo Fashions. The corporate respondents were jointly fined $100,000.

1. Petitioner distributes men's clothing under its registered trademarks and tradenames, which include, inter alia, POLO, POLO BY RALPH LAUREN, and a representation of a mounted polo player (C.A. App. 26, 34-36). Respondents Sergio and Ladowitz are the only two shareholders and officers of respondent Stock Buyers International, Inc. (Stock Buyers), a firm that purchases and sells wearing apparel at wholesale (C.A. App. 207). Respondent Sergio is the sole shareholder of respondent Columbus Business Systems, Inc. (CBS), which shares an address with Stock Buyers. While CBS was held out as a retailer of electronic business equipment, respondents Sergio and Ladowitz used it to obtain merchandise for resale by Stock Buyers. *Id.* at 37, 207.

On January 21, 1982, petitioner filed suit in the United States District Court for the Southern District of Ohio, alleging that respondents Sergio, Stock Buyers, and CBS were engaged in counterfeiting activities that infringed petitioner's registered trademarks (C.A. App. 11-25). On February 3, 1982, those three respondents consented to the entry of a preliminary injunction (Agreed Order) barring them, their agents, and persons acting in concert with them from, inter alia, using any Polo logo, tradename or trademark or any counterfeit of those names or marks in connection with the sale of unauthorized goods. The Agreed Order also barred them from infringing petitioner's registered trademarks and falsely describing or representing goods as being petitioner's merchandise. See Pet. App. A2; C.A. App. 26-37.

After the Agreed Order had been entered, respondents Sergio and Ladowitz operated CBS as East-West Trading Co. (East-West) and Stock Buyers as S & L Liquidators (S & L) (C.A. App. 476). Except for the change of names, the firms' functions remained the same: CBS/East-West acquired counterfeit Polo merchandise for resale by Stock Buyers/S & L. In the fall of 1982, respondents Sergio and Ladowitz approached Schottenstein's, a department store, about the sale of Polo shirts. Upon respondents' assurances that they were selling genuine Polo shirts, Schottenstein's purchased in excess of $415,000 worth of counterfeit shirts between October 1982 and March 1983. *Id.* at 323-330.

2. a. In August 1983, petitioner filed a motion in district court for an order to show cause why respondents should not be held in civil and criminal contempt for violating the Agreed Order (Pet. App. A2; C.A. App. 47). The motion was supported by a declaration of Milton Springut, who was trademark counsel for petitioner (C.A. App. 42-46). Petitioner also sought to have its attorneys appointed to prosecute the criminal contempt (Pet. App. A2). On August 24, 1983, the district court entered an order in which it found probable cause to believe, on the basis of petitioner's submissions, that respondents had willfully violated the terms of the Agreed Order (*id.* at D1-D2), and it entered a formal statement of charges on the same date (C.A. App. 49-53; see also *id.* at 54-58 (amended statement)).[1] The court elected to try

[1] Respondents moved to vacate or dismiss the statement of charges on the grounds that it failed to allege facts sufficient to constitute criminal contempt and that it failed to establish probable cause that they had willfully violated the injunction. Those motions were denied (Pet. App. E4-E6).

the criminal contempt charges first, in order to afford the additional protections available in criminal proceedings (Pet. App. D1-D2). Pursuant to Fed. R. Crim. P. 42(b), the court then appointed petitioner's attorneys to prosecute the criminal contempt charges (Pet. App. D2). The court explained that it had selected petitioner's counsel to prosecute the contempt charges in order to "facilitate an expeditious resolution of these [charges] since [petitioner's] counsel is fully familiar with this matter" (*ibid.*). No one from the Office of the United States Attorney appeared in the proceedings (*id.* at A3).

Respondents then moved for an order vacating the appointment of petitioner's counsel to prosecute the criminal contempt, on the ground that counsel had a " 'distinct private interest in the outcome of the case' " (Pet. App. E6). The district court denied respondents' motion (*id.* at E6-E7). Relying on the Second Circuit's decisions in *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60 (1981), cert. denied, 455 U.S. 944 (1982), and *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (1935), cert. denied, 299 U.S. 603 (1936), the court concluded that neither Rule 42 nor the Due Process Clause requires the district court to designate counsel from the United States Attorney's Office to prosecute a criminal contempt and that the court should be permitted to appoint counsel for the opposing party in the underlying civil litigation because of his familiarity with the case (Pet. App. E7). The district court acknowledged that when the moving party's counsel is appointed as the prosecuting attorney, "some degree of self-serving involvement is inevitable" (*ibid.*). However, the court believed that such involvement should not bar the appointment of petitioner's counsel, because counsel would be required to establish

beyond a reasonable doubt that respondents willfully violated the injunction (*ibid.*).[2]

b. At the conclusion of a four-day jury trial, all four respondents were convicted. Counsel for petitioner Polo Fashions submitted a sentencing memorandum, in petitioner's name (C.A. App. 233-250), urging the imposition of a sentence on each individual respondent of six months' imprisonment and a fine in the amount of $500,000, to be paid to petitioner (*id.* at 237, 247). The court also offered counsel for petitioner an opportunity to make a statement at the sentencing hearing (*id.* at 247).

Respondents Ladowitz and Sergio were each sentenced to a term of six months' imprisonment and a fine of $100,000, to be paid to petitioner (see 18 U.S.C. 402). The court specified that if the fines were not paid at the expiration of six months, the individual respondents were to stand committed until the fines were paid or until the respondents were otherwise discharged by law (C.A. App. 252, 253). The court also ordered that the corporate respondents, Stock Buyers and CBS, be jointly fined in the amount of $100,000 (*id.* at 254). That fine was apparently also payable to petitioner (see *id.* at 237).

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[2] Respondents moved for a jury trial under 18 U.S.C. 402 and 3691. The latter statute provides that an alleged contemnor is entitled to a jury trial, "which shall conform as near as may be to the practice in other criminal cases," if the act constituting the alleged contempt is also a criminal violation under any federal statute or under the law of the state where the act occurred. Because the sale of counterfeit goods is a criminal offense under Ohio Rev. Code Ann. § 2913.32 (page 1982), the district court granted respondents' motion (C.A. App. 159-161). The district court also concluded that discovery in the underlying civil case should not be stayed pending the outcome of the charges of criminal contempt (*id.* at 122-125).

3. The court of appeals reversed the contempt convictions (Pet. App. A1-A14). The court held, in the exercise of its supervisory powers, that it was an abuse of discretion for the district court to appoint the attorneys for petitioner to prosecute the charges of criminal contempt (*id.* at A10-A14).[3]

The court of appeals recognized that criminal contempt was once considered to be sui generis and did not call for the full panoply of safeguards traditionally required in a criminal proceeding. However, the court observed that in *Bloom* v. *Illinois*, 391 U.S. 194 (1968), a case involving the right to trial by jury, this Court had stated that "a defendant in a criminal contempt action has the right 'not to be subjected to serious criminal punishment without the benefit of *all* the procedural protections worked out carefully over the years and deemed fundamental to our system of justice' " (Pet. App. A12, quoting 391 U.S. at 208 (emphasis added by the court of appeals)).

One of the necessary procedural protections with respect to criminal contempt, the court of appeals concluded, is the requirement that criminal cases "be prosecuted by disinterested, publicly employed attorneys" (Pet. App. A12). The court reasoned that a privately employed attorney has the ethical obligation of advancing his client's interests (*ibid.*); a public prosecutor, by contrast, is charged with seeing that " 'justice shall be done' " and is " 'in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer' " (*id.* at A13, quoting *Berger* v.

---

[3] The court expressly did not decide that the appointment of petitioner's counsel "constitute[d] a per se due process violation" (Pet. App. A12).

United States, 295 U.S. 78, 88 (1935)). In the court's view, it was "too much to expect an attorney committed to his [private] client and the client's cause to recognize the 'twofold aim' referred to in *Berger* when acting as prosecutor in proceedings which, if successful, can benefit immeasurably that client and his cause" (Pet. App. A14). The court acknowledged that prosecutors employed by the federal government might also overlook their obligations on occasion and become too concerned with obtaining convictions. But it explained that "this overzealousness does not have its roots in a conflict of interest[,]" such as that which results from "the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction" (*ibid.*).

The court of appeals did not hold, however, that the United States Attorney must actually prosecute all criminal contempts. To the contrary, it made clear that "[i]f the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so" (Pet. App. A14). The court held only that although counsel for an interested party could be appointed to *assist* the United States Attorney or the disinterested private attorney, counsel for the interested party "may not conduct criminal contempt proceedings as sole or primary counsel" (*ibid.*).

ARGUMENT

1. In our view, the court of appeals did not exceed its supervisory authority by establishing a general rule barring the appointment of counsel for an interested private party to prosecute charges of criminal contempt. As this Court recently reaffirmed, the courts of appeals have the power "to mandate 'pro-

cedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 6 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). See also *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 n.10 (1980); *Barker* v. *Wingo*, 407 U.S. 514, 523, 530 n.29 (1972). This principle has particular application to the development of procedures for the exercise of the contempt power, which has been viewed as essential to the ability of the federal courts to enforce their authority. See, *e.g.*, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873); *Ex parte Terry*, 128 U.S. 289, 302-304 (1888); *In re Debs*, 158 U.S. 564, 594-595 (1895). The court of appeals' reliance on its supervisory authority in this case also may be viewed as an aspect of the recognized power of the federal courts to regulate and supervise the conduct of attorneys appearing before them (cf. 28 U.S.C. 1654), to the extent such matters are not separately addressed by federal law or within the domain of another branch (*e.g.*, 28 U.S.C. 547). See, *e.g.*, *United States* v. *Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring); *United States* v. *Agosto*, 675 F.2d 965, 969, 976-977 (8th Cir.), cert. denied 459 U.S. 834 (1982); *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978); Fed. R. Crim. P. 44(c) and advisory committee note. Cf. *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986).

Nor is the rule adopted by the court of appeals in this case an unreasonable one. In the modern federal system, those who prosecute crimes are "public officials" who "must serve the public interest." *Mc-*

shall v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980). See also *Berger* v. *United States*, 295 U.S. 78, 88 (1935). "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall* v. *Jerrico*, 446 U.S. at 249-250. Consistent with these principles, federal statutes bar employees of the Department of Justice from participating in prosecutions in which they or persons with whom they are affiliated have a financial or personal interest. 18 U.S.C. 208; 28 U.S.C. 528. As the court of appeals pointed out (Pet. App. A10-A11), standards of conduct adopted by the legal profession likewise call for a disinterested prosecutor. See, *e.g.*, Model Code of Professional Responsibility EC 7-13 (1983). Furthermore, the general ethical prohibition against conflicts of interest (*id.* at Canon 5) raises a serious question about the appropriateness of appointing an attorney who owes his principal duty of loyalty to a private client to prosecute a related criminal contempt on behalf of the public.

This is not to say that a criminal contempt prosecution is in all respects identical to other proceedings in which conflicts of interest may arise. Where a criminal contempt proceeding is initiated by the court, the actual "prosecutorial decision" (*Marshall* v. *Jerrico*, 446 U.S. at 249) is effectively taken away from the attorney appointed by the court to present the case. In addition, the historical role of the civil litigant or his attorney as an informant or relator in contempt proceedings and the recognition of the speical interest the civil litigant has in the matter (see 18 U.S.C. 402 (fines may be paid to party injured)) suggest that the Constitution may tolerate a greater

role in criminal contempt proceedings for the attorney for an interested private party than would be permitted in the case of other crimes. Cf. Pet. App. A14.

On the other hand, in spite of its sui generis nature as an historical matter, criminal contempt shares many of the features of more conventional crimes. Criminal contempt proceedings "are between the public and the defendant, and are not a part of the original cause" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911)), and, for purposes of the rights of the defendant, contempt has been regarded by this Court as "a crime in the ordinary sense" (*Bloom* v. *Illinois*, 391 U.S. at 201). Against this background, we cannot say that the court of appeals erred in adopting a rule barring counsel for an interested private party from assuming the lead role in prosecuting a case of criminal contempt. This is particularly so where, as here, conviction may lead to a sentence of imprisonment. Cf. *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

2. Of course, a court of appeals may not exercise its supervisory power in a manner that actually conflicts with the Constitution or an Act of Congress. *Thomas* v. *Arn*, slip op. 7-8. There is, however, no such inconsistency here. The Constitution surely does not *mandate* that counsel for an interested private party be appointed by a court to prosecute a criminal contempt; nor can the Constitution be said to prohibit a court from automatically deeming such counsel to be disqualified in the matter.

There likewise is no inconsistency with statutory provisions governing the subject of contempt. Congress has recognized the power of the federal courts to punish contempts since the enactment of Section 17

of the Judiciary Act of 1789, ch. 20, 1 Stat. 83.[4] Section 17 did not "prescribe any special procedure for determining a matter of contempt," and it accordingly left the mode of proceeding "to be determined according to such established rules and principles of the common law as were applicable to our situation." *In re Savin*, 131 U.S. 267, 275-276 (1889). Although the reach of the contempt power was curtailed by the Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 488,[5] Congress did not otherwise prescribe detailed procedures for the exercise of the courts' powers to punish for contempt. See *Green* v. *United States*, 356 U.S. 165, 169-173 (1958). And except for certain specified limitations—principally the right to a jury trial (see 18 U.S.C. 402 and 3691) —Congress still has not itself prescribed such procedures or established standards regarding the selection of counsel who may assist the courts in conducting criminal contempt proceedings.[6] Congress instead has

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[4] Section 17 (1 Stat. 83) provided in relevant part that the courts of the United States "shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same * * *."

[5] See *Bloom* v. *Illinois*, 391 U.S. 194, 203-204 (1968); *Nye* v. *United States*, 313 U.S. 33, 45-48 (1941).

[6] We do not agree with respondents' contention (Mot. to Dis. 2-3) that the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) and 28 U.S.C. 547 require the participation of the United States Attorney in all punishments for criminal contempt imposed by the federal district courts. The Appointments Clause permits Congress to vest the appointment of "inferior Officers" of the United States not only in the President and the Heads of Departments, but also in the "Courts of Law." See 28 U.S.C. 547 (authorizing the district court in a district in which the office of United States Attorney is

left to this Court the development of procedures to be followed in the imposition of punishment for criminal contempt (see Act of Nov. 21, 1941, ch. 492, 55 Stat.

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vacant to appoint a United States Attorney to serve until the vacancy is filled). Accordingly, assuming arguendo that an attorney appointed by a district court to participate in contempt proceedings is to be regarded as an Officer of the United States for purposes of the Appointments Clause, the manner of his appointment comports with that Clause. Respondents' reliance on *Buckley* v. *Valeo*, 424 U.S. 1 (1976), in support of their Appointments Clause argument therefore is misplaced as well.

To be sure, the actual prosecution of federal crimes is uniquely the responsibility of the Executive Branch. *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967); *United States* v. *Cox*, 342 F.2d 167, 193 (5th Cir.), cert. denied, 381 U.S. 935 (1965). See also *Buckley* v. *Valeo*, 424 U.S. at 128; *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1868). And the crime of contempt may be prosecuted in the same manner as other crimes: by indictment or information. Fed. R. Crim. P. 7(a). See, *e.g.*, *United States* v. *Squartino*, 778 F.2d 734 (11th Cir. 1985); *United States* v. *Williams*, 622 F.2d 830, 837-838 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Morales*, 566 F.2d 402, 404 (2d Cir. 1977). When the prosecution is initiated in that fashion, it must be under the direct control of the Attorney General and United States Attorney. 28 U.S.C. 547(1). However, Rule 42(b) contemplates that a criminal contempt proceeding may also be initiated by the court, by means of a show cause order or similar notice to the accused. In that event, at least where the United States Attorney has declined prosecution and the contempt by a private party does not arise out of civil or criminal litigation to which the United States or an agency or officer thereof is a party (see *Frank* v. *United States*, 384 F.2d 276, 278 (10th Cir. 1967), aff'd on other grounds, 395 U.S. 147 (1969)), we do not believe that either the Appointments Clause or 28 U.S.C. 547(1) bars a court from appointing a private attorney to serve as the prosecutor for the contempt proceedings.

779), and this Court has implemented that authority through the promulgation of Fed. R. Crim. P. 42.

The court of appeals' exercise of its supervisory authority in this case does not conflict with Rule 42(b). It is true that the Second Circuit has relied upon Rule 42(b) in support of its practice of permitting counsel for a party to the underlying civil litigation to be appointed to prosecute a criminal contempt, on the ground that the advisory committee note cites *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936), in which that practice was endorsed. See *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60, 64-65 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982). See also *Universal City Studios* v. *N.Y. Broadway International Corp.*, 705 F.2d 94, 96-97 (2d Cir. 1983). However, the propriety of the appointment of private counsel was not directly presented in *McCann*, which primarily addressed the problem of ascertaining when a particular contempt should be regarded as civil or criminal. The *McCann* court observed that among the indicia used to determine the nature of the action is the character of the prosecutor, since a criminal contempt may be "prosecuted either by the United States or by the court to assert its authority" (80 F.2d at 214). The court recognized that when the United States Attorney brings a prosecution, the criminal nature of the action will be clear. The court also stated that in some instances, the judge may seek the assistance of the attorney for a party, "who will indeed ordinarily be his only means of information when the contempt is not in his presence" (*ibid.*). But because the character of the proceeding may be more equivocal in such instances, the *McCann* court concluded that the district judge can resolve any doubt by "enter[ing]

an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court" (*id.* at 215). Because the district court did not enter such an order in *McCann* itself, the court of appeals reversed the conviction.

Rule 42(b) was promulgated in 1944, after the decision in *McCann*. The first sentence of the Rule provides that a criminal contempt (except a summary contempt governed by Rule 42(a)) "shall be prosecuted on notice," and the second sentence specifies the contents of the notice, including "the essential facts constituting the criminal contempt charged." The third sentence then provides: "The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States [A]ttorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest." The notes of the advisory committee state that "to obviate the frequent confusion between criminal and civil contempt proceedings," the "requirement in the second sentence that the notice shall describe the criminal contempt as such * * * follows the suggstion made in *McCann* * * *." However, the advisory committee note says nothing about the source of the reference to appointed counsel in the third sentence of Rule 42(b); nor does it specifically endorse the statement in *McCann* that the attorney representing a private party in related civil litigation may be designated to prosecute the contempt.

In fact the third sentence does not specifically mention what role even a disinterested private attorney appointed by the court may play in the contempt proceedings, beyond filing the application for an order to show cause or order of arrest. Although we do not

read that omission to preclude the court from appointing a private attorney to prosecute the charges of contempt arising out of private litigation where the United States Attorney has declined prosecution, we likewise do not read the Rule to prohibit a court of appeals (or this Court) from exercising its supervisory power to prohibit counsel for an interested party from being selected for that purpose.

3. As explained above, the Second Circuit, in contrast to the Sixth Circuit in the instant case, has permitted the appointment of counsel for an interested private party to prosecute a criminal contempt. See *Musidor, B.V.* v. *Great American Screen, supra*; *United States ex rel. Vuitton Et Fils S.A.* v. *Klayminc*, 780 F.2d 179 (2d Cir. 1985), petitions for cert. pending, Nos. 85-1329 and 85-6207. The issue does not appear to have arisen with great frequency in other circuits. Dicta in the Fifth Circuit's decision in *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F.2d 312, 319-320 (1969), appears to prohibit prosecution by counsel for an interested private party, although the Fifth Circuit declined to reach that issue in a subsequent case in which it was more directly raised. See *United States* v. *McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984). In *Midway Manufacturing Co.* v. *Kruckenberg*, 779 F.2d 624 (1986), the Eleventh Circuit remanded for the limited purpose of determining whether counsel for an interested private party was properly appointed in the particular circumstances presented, and it declined to decide whether there should be an absolute rule barring such appointments. Other courts of appeals have concluded that the interested private *party* cannot prosecute a criminal contempt, but have not addressed the question whether *counsel*

for the party may be appointed by the court to do so. *In re Lahm Industries, Inc.*, 609 F.2d 567, 569-570 (1st Cir. 1979); *Ramos Colon* v. *United States Attorney*, 576 F.2d 1, 5 (1st Cir. 1978); *Kienle* v. *Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir. 1955).

Because the Sixth Circuit in the instant case relied on its supervisory powers, the decision below does not squarely conflict with the decisions of the Second Circuit, as there is no requirement that different courts of appeals adopt identical rules in the exercise of their supervisory powers. Moreover, the Fifth Circuit, in *Brotherhood of Locomotive Firemen & Enginemen*, is the only other court of appeals to have addressed the question, and the reach of its holding is somewhat unclear. See *Midway Manufacturing Co.* v. *Kruckenberg*, 779 F.2d at 626; *United States* v. *McKenzie*, 735 F.2d at 910 n.11. Nonetheless, we believe that the questions raised by the appointment of counsel for an interested private party to prosecute a criminal contempt are sufficiently important to the administration of justice to warrant review by this Court, especially in light of the differing views of several courts of appeals in recent decisions regarding the propriety of the practice.

We note, however, that there is a substantial question regarding the standing of petitioner Polo Fashions to petition for a writ of certiorari to review the judgment of the court of appeals in this case. The Court has made clear that a proceeding for the imposition of criminal contempt sanctions is "a proceeding with the court, or, more properly, the Government, on one side and the defendants on the other" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 445). In a criminal contempt proceeding prosecuted by a private attorney appointed by the court, the at-

torney prosecuting the case does not act on behalf of a private party, but "as a representative of the United States" (*ibid.*). Ordinarily, a private party has no standing to challenge a prosecutorial decision or to seek review of a ruling against the prosecution in a criminal case. See *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 9; *Princeton University* v. *Schmid*, 455 U.S. 100 (1982); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Consistent with these principles, the First and Seventh Circuits have held that a private party in related civil litigation has no standing to prosecute a criminal contempt or to take an appeal in matters relating to the contempt proceedings. *Kienle* v. *Jewel Tea Co.*, *supra*; *In re Lahm Industries, Inc.*, *supra*; *Ramos Colon* v. *United States Attorney*, *supra*. See also *United States* v. *McKenzie*, *supra* (attorney appointed by court has no standing under 18 U.S.C. 3731 to appeal district court's dismissal of contempt proceedings).

Accordingly, notwithstanding the district court's order in this case that the fines be paid to petitioner, it may be that petitioner is not entitled to seek review of the judgment below in its own behalf and in its own name. For this reason, if the Court grants the petition for a writ of certiorari in this case, we suggest that the Court request the parties to address the question of petitioner's standing to petition for a writ of certiorari. In any event, because of the doubt regarding petitioner's standing, the Court may wish to consider also granting the pending petitions for a writ of certiorari seeking review of the Second Circuit's decision in *United States ex rel. Vuitton Et Fils S.A.* v. *Klayminc*, 780 F.2d 179 (1985), which do not present the same standing problem.

Supreme Court, U.S.
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No. 85-455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POLO FASHIONS, INC.,

Petitioner,

V.

STOCK BUYERS INTERNATIONAL, INC., COLUMBUS BUSINESS SYSTEMS, INC., EUGENE SERGIO, and MORTON LADOWITZ,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 85-455

IN THE

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OCTOBER TERM, 1985

POLO FASHIONS, INC.,

Petitioner,

v.

STOCK BUYERS INTERNATIONAL, INC.,
COLUMBUS BUSINESS SYSTEMS, INC.,
EUGENE SERGIO, and MORTON LADOWITZ,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PRELIMINARY STATEMENT

Petitioner Polo Fashions, Inc. ("Polo") submits this Supplemental Brief in support of its application for a writ of certiorari, in order to respond to issues raised in the Amicus Curiae Brief filed by the Solicitor General ("*Polo* Amicus Brief"), and to identify important distinctions between the issues raised in this case and those that were recently presented to the Court in *Young v. United States ex rel. Vuitton et Fils S.A., cert. granted,* 106 S. Ct. 3270 (1986), *argued,* Jan. 13, 1987.

ARGUMENT

I. Polo Has Standing to Petition for a Writ of Certiorari.

At the conclusion of its Amicus Brief in support of the granting of a writ of certiorari, the Solicitor General stated that there is a "substantial question" concerning the standing of Polo to seek review of the judgment below. *Polo* Amicus Brief at 16. Despite the reservations expressed by the Solicitor General, Polo undoubtedly has standing to petition for a writ of certiorari to the Sixth Circuit.

In an ordinary criminal proceeding, of course, a private party has no standing to pursue a criminal appeal on behalf of the prosecution because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Diamond v. Charles*, 106 S. Ct. 1697, 1704 (1986) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). Polo does not dispute this general rule. The rule, however, simply has no application to this case. Polo's counsel was specifically appointed by the District Court pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure to prosecute the respondents for criminal contempt. Polo is prosecuting this appeal to vindicate the authority of the District Court, and thus is not seeking to pursue unilaterally a criminal appeal in furtherance of its private interests. If the District Court possessed authority to appoint Polo's counsel to prosecute the respondents, as Polo contends, it would be illogical to conclude that Polo's counsel may not defend the judgment of the District Court on appeal and before this Court.

The Solictor General has cited no authority supporting such an anomalous result. Instead he has relied on a number of irrelevant opinions which do not support this proposition in the least. In both *In re Lahm Industries, Inc.*, 609 F.2d 567 (1st Cir. 1979) and *Kienle v. Jewel Tea Co.*, 222 F.2d 98 (7th Cir. 1955), the courts dismissed appeals on standing grounds because the party seeking criminal contempt sanctions had never been appointed as a prosecutor under Rule 42(b). *See Musidor, B.V. v. Great American Screen*, 658 F.2d 60, 64 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982). The other cases cited by the Solicitor General, *Ramos Colon v. United States*

Attorney, 576 F.2d 1 (1st Cir. 1978) and *United States v. McKenzie,* 735 F.2d 907 (5th Cir. 1984), held only that private parties had no standing to appeal the district court's *refusal* to pursue criminal contempt proceedings. Since the attorneys' authority derived from the district court, when the court indicated it did not want to pursue contempt proceeding, the attorneys' authority was terminated. *Ramos Colon,* 576 F.2d at 5; *McKenzie,* 735 F.2d at 911-12. Here, of course, Polo secured the necessary Rule 42(b) order to prosecute this proceeding, and the District Court entered judgments of conviction against the respondents. Unlike the appellants in *Colon* and *McKenzie,* Polo's counsel are still acting pursuant to their authority as the representative of the District Court. In this context, the Solicitor General's reliance upon these cases to suggest a standing issue is misplaced. Clearly, Polo has standing to petition for a writ of certiorari as the District Court's duly appointed representative pursuant to Rule 42(b).

II. Appointment of Counsel for an Interested Party Is Proper Where the Defendant Will Only Be Prosecuted for a Non-Serious Criminal Contempt.

The Solicitor General argues that the rule adopted by the Sixth Circuit was permissible because, in part, it comports with decisions of this Court which regard contempts as crimes in the ordinary sense for the purpose of defining defendants' rights. *Polo* Amicus Brief at 10. His discussion, however, ignores the fact that the instant case is *not* one where the defendants were prosecuted for a *serious* crime. Because the sale of counterfeit goods is a crime in Ohio,[1] the contempt procedures were conducted pursuant to 18 U.S.C. § 402, which imposes a maximum term of imprisonment of six months.[2] Thus, the

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[1] *See* Ohio Rev. Code Ann. § 2913.32 (Anderson 1982).

[2] 18 U.S.C. § 402 is applicable to contempt proceedings if the act which is the subject of the proceeding is also a criminal offense under the laws of the United States or any state.

respondents were only prosecuted for non-serious contempt. *See Cheff v. Schnackenberg,* 384 U.S. 373, 379-80 (1966) (proceeding is for non-serious contempt where maximum penalty is for not more than six months).

This Court has recognized the important distinction between serious and non-serious contempt in terms of the rights afforded to defendants. Defendants in non-serious contempt proceedings are not afforded the same procedural protection as those charged with serious contempts. *Compare Bloom v. Illinois,* 391 U.S. 194, 198 (1968) (the constitution mandates jury trials for all serious contempt proceedings) *with Cheff,* 384 U.S. at 380 (no constitutional right to jury trial for criminal contempt where the maximum penalty is only six months, but the Court held under its supervisory powers that contempt sentences of more than six months may not be imposed without a jury trial). *See also Muniz v. Hoffman,* 422 U.S. 454, 475-76 (1975).

Indeed, one of the important distinctions between the issues presented in this case and those in *Vuitton* is that in the latter case the defendants were prosecuted as serious contemnors pursuant to 18 U.S.C. § 401 and received prison sentences of up to five years. *United States ex rel. Vuitton et Fils S.A. v. Klayminc,* 780 F.2d 179, 180 (2d Cir. 1985). Thus, consistent with *Bloom* and *Cheff,* the respondents have a substantially weaker claim than the defendants in *Vuitton* to have disinterested attorneys act as prosecutors in their contempt proceedings. The Solicitor General apparently recognizes this distinction in his Amicus Curiae Brief submitted in *Vuitton* ("*Vuitton* Amicus Brief"):

> [the] characterization of the contempt sanction [as a crime] suggests the appropriateness of a supervisory rule *that requires a disinterested prosecutor in cases of serious contempt.*

Vuitton Amicus Brief at 24 (emphasis added). The implication is that in cases of non-serious contempt a requirement of a disinterested prosecutor would not necessarily be appropriate. This only emphasizes the need for this Court to issue a writ of certiorari so that it can determine whether the Sixth Circuit

properly exercised its supervisory power when it prohibited the District Court from appointing counsel for an interested party to prosecute a non-serious contempt. The question of whether different standards should apply to contempts pursuant to 18 U.S.C. § 402 than those brought under 18 U.S.C. § 401 is an important one because many if not most acts of criminal contempt also constitute violations of state or federal law.

III. In the Absence of Any Showing of Prejudice to Respondents by Virtue of the Appointment of Private Counsel Reversal of the Convictions Is Not an Appropriate Remedy.

In supporting the propriety of the Sixth Circuit's broad exercise of its supervisory power, the Solicitor General ignores the fact that the Sixth Circuit reversed criminal convictions in violation of specific limits this Court has established for this drastic remedy. *See United States v. Hasting,* 461 U.S. 499, 506-07 (1983); *United States v. Payner,* 447 U.S. 727, 734 (1980). Even if the District Court committed error in appointing Polo's counsel, in the absence of any showing of prejudice to respondents based upon their prosecution of the criminal contempt proceedings the convictions must be sustained. *Cf. Rose v. Clark,* 106 S. Ct. 3101, 3106-07 (1986).

In *Hasting* the Seventh Circuit reversed a conviction on the basis of prosecutorial misconduct, without considering whether the error was prejudicial. 461 U.S. at 503. This Court reversed and admonished federal courts to approach the exercise of supervisory powers "with some caution" and to refrain from reversing convictions where there is no reasonable likelihood that the practice complained of contributed to the conviction and where the purported violation was remediable by less drastic measures. *Id.* at 506-07. *See* Fed. R. Crim. P. 52(a).

Under this standard, respondents convictions should have been affirmed. The Sixth Circuit found no actual prejudice from Polo's counsels' participation in this case. Indeed, re-

spondents have never even asserted such prejudice as a basis for reversing their convictions.[3] Instead, although the evidence of the respondents guilt was overwhelming, the Sixth Circuit relied upon general ethical constraints on public prosecutors to reverse the convictions. *Polo Fashions v. Stock Buyers International, Inc.*, 760 F.2d 698, 704-05 (6th Cir. 1985).[4]

Moreover, the Sixth Circuit's interests in promulgating a supervisory rule, assuming such a rule were appropriate, may be satisfied by far less drastic means than the reversal of these convictions. The court could simply have announced a prospective rule and then reviewed this case to ascertain, if such a claim had been asserted, whether actual prejudice had resulted from the Rule 42(b) appointment. *See United States v. Florea*, 541 F.2d 568, 571-72 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). In the absence of either a claim or finding of prejudice to respondents, and in light of the availability of less drastic means to prohibit the appointment of counsel for interested parties to prosecute contempt proceedings, the Sixth Circuit was precluded from invoking its supervisory powers to reverse respondents' convictions. *Hasting*, 461 U.S. at 506-07; *Payner*, 447 U.S. at 734-35.

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[3] In *Vuitton*, on the other hand, petitioners claimed they suffered actual prejudice from the appointment of the private prosecutor. Brief for Petitioners on Writs of Certiorari to the United States Court of Appeals for the Second Circuit at 31-32.

[4] The Sixth Circuit's reliance upon these ethical constraints also was misplaced, because the limited role of Polo's counsel was not comparable to the broad powers exercised by a public prosecutor. The "prosecutorial decision" in this case was made by the District Court, and Polo's counsel did not assume any of the public prosecutor's discretionary responsibilities. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). They simply presented evidence of a completed contempt to an impartial jury. This limited function does not implicate any of the concerns supporting the presence of a disinterested prosecutor in a standard criminal prosecution. Thus, the general ethical constraints upon public prosecutors do not support the Sixth Circuit's decision in this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari previously filed with this Court, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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